SUPREME COURT, U. S.

FILED

SEP 9 1974

MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

October Term, 1974.

No. 74-147

AAACON AUTO TRANSPORT, INC.,
*Petitioner,*

*v.*

HONORABLE MORRIS E. LASKER,
*Respondent.*

## MEMORANDUM AS *AMICUS CURIAE.*

LAGINESTRA & DONNELLY,
By NICHOLAS M. LAGINESTRA,
*Attorneys for J. Wayland Thomas and Cora G. Thomas, in the original action,*
10 Platt Street,
New York, N. Y. 10038

## Table of Contents.


| | Page |
|---|---|
| Questions Presented | 1 |
| Further Reasons for Denying the Petition | 2 |
| Conclusion | 4 |
| APPENDIX: | |
| Bill of Lading Agreement | 5 |
| Letter, Dated December 12, 1973 (Zola and Zola to Honorable Morris E. Lasker) | 10 |

IN THE

# Supreme Court of the United States

No. .....

OCTOBER TERM, 1974.

AAACON AUTO TRANSPORT, Inc.,

*Petitioner,*

*v.*

HONORABLE MORRIS E. LASKER,

*Respondent.*

## MEMORANDUM AS *AMICUS CURIAE.*

The writer, Nicholas M. LaGinestra, is the attorney appearing on page 23 of the petition as attorney for the respondent in the original action, the caption of which appears on the same page (LaGinestra & Donnelly).

### Questions Presented.

Under the Questions Presented of the petition, Mr. Zola neglected to state the *main* question. Mr. Zola neglected to tell this Honorable Court that he, as attorney for AAACON, I, as attorney for the respondent in the original action as it appears on page 23, to wit, J. Wayland Thomas and Cora G. Thomas, and the Honorable Judge Lasker agreed in the judge's chambers in the presence of each other than the Honorable Judge Lasker would withhold any decision pending the decision by the I.C.C., since it was the contention of the respondent, whom I represented, that the bill of lading in question was issued by Mr. Zola's client in violation of I.C.C. laws, rules and regulations.

The question presented to this court, therefore, is whether Mr. Zola, acting as attorney and vice-president of AAACON, the petitioner, should repudiate that agreement when the Honorable Judge Lasker, in conformity therewith, issued his memorandum of June 14, 1972.

Substantiating my contention herein I attach hereto copy of a letter dated December 12, 1973, addressed to the Honorable Morris E. Lasker by Mr. Zola. I call specific attention to the last paragraph of that letter where it says:

> "Accordingly, we respectfully request that your Memorandum Endorsement be recalled and reconsidered and that in accordance with your original Memorandum dated June 14, 1973, that the matter be held in abeyance until the Commission renders its decision and that decision becomes final."

I fail to see how Mr. Zola can blow hot and cold at the same time, asking the Honorable Judge Lasker to withhold the decision and then bringing a mandamus proceeding.

I, therefore, call the attention of this court to this most important fact, which in itself should deny the petition for a writ of certiorari. Once Mr. Zola agreed with the Honorable Judge Lasker and myself, he should be made to stand by the agreement.

**Further Reasons for Denying the Petition.**

Mr. Zola fails to attach the bill of lading which is in controversy in the original case. An examination of the bill of lading will indicate to this court that the I.C.C. Administrative Judge upheld my contentions *in toto*. Mr. Zola also filed exceptions to the findings of the Administrative Judge of the I.C.C. The bill of lading is against the

I.C.C. regulations in that it requires arbitration in New York City, New York County and New York State by a shipper in any claim or controversy founded in contract or tort (please see p. 5 of the petition). Arbitration is not against I.C.C. regulations nor against court regulations if it is done to PROMOTE JUSTICE AND AVOID LITIGATION. In this case where the petitioner does business throughout the United States, it is certainly unjust to require a shipper from Oregon or California to come to New York with his mechanic and witnesses to arbitrate a $700 claim when the contract was not entered into in New York state, neither the shipper nor the witnesses reside in New York, the accident never occurred in New York, and the shipment destined for Oregon originated in Florida. This would require a shipper to spend many times the amount of the loss to recover the loss. This clause is not put in the bill of lading for the purpose of avoiding litigation and doing justice; it is put in the bill of lading for the *only purpose* of avoiding liability and obligation to pay on the part of Mr. Zola's client by making unrealistic the enforcement of the claim. I ask this court to conceive the hundreds of losses involving millions of dollars in the aggregate but individually in amounts where it does not pay for the shipper to come to New York and enforce payment of the claim, and all of which inures to the benefit of Mr. Zola's client. This has been determined by the Administrative Judge of the I.C.C. to be against their rules in protecting the rights of the shipper.

A further reason for denying this petition is that the bill of lading which Mr. Zola failed to attach to the petition substantially states that if the shipper recovers from his insurance carrier, the payment by the insurance carrier to the shipper inures to the benefit of Mr. Zola's client and, further, the shipper cannot assign the claim. Such losses will tend to increase the premiums of the shippers and other persons so that everyone pays for the losses ex-

cept Mr. Zola's clients, who benefit by it. To better state the fact is that they deny subrogation and are using the people's money to satisfy their client's obligations to their shipper. This has also been found to be contrary to I.C.C. regulations, as is evidenced by the findings of the I.C.C. and the orders attached in the original file of this case.

A further ground for rejection of this petition is that there is a further illegal provision in the bill of lading to the effect that, regardless of what the law is, the arbitrator is to abide by the terms of the bill of lading regardless of its illegality. In other words, Mr. Zola's client makes the law applicable to its case, chooses the place where it is to be decided and limits the arbitrator to what decision he has to make. In other words, the arbitrator is nothing but a "robot."

This does not conform to the I.C.C. rules and regulations, and I respectfully refer this court to the findings of the Administrative Judge.

**Conclusion.**

For the foregoing reasons: (1) agreement by Mr. Zola to have the Honorable Judge Lasker hold any opinion until the final I. C. C. ruling, (2) repetition of that request in the letter of Mr. Zola, hereto attached, (3) the fact that the bill of lading is in violation and has been found in violation of I.C.C. rules and regulations by the Administrative Law Judge, this petition should be dismissed.

Respectfully submitted,

LaGINESTRA & DONNELLY,
By NICHOLAS M. LaGINESTRA,
Attorneys for J. Wayland Thomas and Cora G. Thomas, in the original action.

## APPENDIX.

### Bill of Lading Agreement.

E. 1780

AAACON AUTO TRANSPORT, INC.

BILL OF LADING AGREEMENT

Pick Up Date 2/11/71

Estimated Due Date 2/18/71

Pick Up Car From J. W. Thomas 306-14th Ave., N. E.. St. Petersburg, Fla. Phone 894-8556

Consignee Mr. J. W. Thomas 814 Liberty Road Duquesne, Pa. Phone (412) 466-8445

Registered Car Owner (Shipper) James W./Cora G. Thomas

Registered Address 814 Liberty Ave.

City & State Duquesne, Pa.

Car Make Chrysler

Type Imperial

Model Doors 4

License # AO3627, Pa.

Automatic Trans. yes

Power Brakes yes

Power Steering yes

Serial # A16175905

Condition Report

√ Good—F Fair—B Broken—C Cracked—D Dented—S Scratched—P Pitted—X Missing

| | | | |
|---|---|---|---|
| RF Fender | √ | R Window | √ |
| Front Bumper | √ | Tire Jack | √ |
| Front Grille | √ | Spare Tire-Wheel | √ |
| Front Lights | √ | R Lights | √ |
| Hood | √ | RR Panel | √ |
| Windshield | √ | RR Window | √ |
| LF Fender | P | RR Door | P |
| RF Vent Window | √ | R Body Sill | √ |
| LF Vent Window | √ | RF Window | √ |
| LF Window | √ | RF Door | √ |
| LF Door | P | Roof | √ |
| L Body Sill | √ | Hub Caps | 4 |
| LR Window | √ | Radio | √ |
| LR Door | P | Heater | √ |
| LR Panel | P | Upholstery | √ |
| Trunk Lid | P | Keys | 2 |
| R Bumper | √ | RR Fender | X |
| | | LR Fender | X |

Luggage in Trunk Only listed on order form.
All very minor.

Shipper guarantees the operating and mechanical condition of the herein mentioned vehicle during transport, and assumes all responsibilities for damage and all liabilities arising therefrom. Regardless of cause, carrier shall not be liable for any damages or consequences from or for any delay in delivery, any rental of substitute vehicle, any mechanical defect occurring during shipment, or any excess mileage. Shipper agrees that driver is an independent contrator and that driver may make any necessary repairs to said vehicle of less than twenty dollars without shipper's consent and repairs in excess of twenty

dollars with shipper's prior consent. Shipper shall pay for all said repairs. In the event of damage or loss to said vehicle, shipper shall retain all or part of driver's fee required to pay for same; or, if said damage or loss shall exceed driver's fee, shipper shall forward driver's fee, constituting final freight bill payment due, to carrier within seven days after said damage or loss occurs. Payment to driver by shipper or shipper's agent shall constitute conclusive evidence of satisfactory delivery of vehicle. Retention of driver's fee, at shipper's option, beyond said seven day period shall constitute conclusive evidence of full settlement and satisfaction of any claims against carrier by shipper and shipper's assigns. This Bill of Lading and any shipment hereunder shall not operate as a waiver or avoidance of any contract of indemnity which shipper effected prior hereto or the obligations thereunder which shall devolve primarily upon the indemnitor and said contract of indemnity shall be and remain in full force and effect. Unless a greater value is declared thereon above, shipper agrees that the declared value of all personal property in the vehicle is under fifty dollars and hereby releases carrier from all obligations for loss or damage thereto in excess of fifty dollars. All terms and conditions of the Uniform Straight Bill of Lading, a copy of which is available to shipper and driver at the office of carrier, are included herein by reference and made a part hereof. Any notice required under said Uniform Straight Bill of Lading shall be invalid and void unless personally signed by and forwarded by the shipper to carrier. *The shipper shall commence any legal action necessary to mitigate or recover damages from any third party responsible, or any source liable, therefor. Any recovery by, or satisfaction of said damages to, shipper from any source liable or responsible to shipper therefor, shall, to the extent thereof, operate and constitute a discharge and release of said claims against carrier by ship-*

*per and shipper's assigns.* Driver alone shall be responsible for all violations of law during the time that the vehicle is in his possession. *Driver and shipper consent to the personal jurisdiction of the courts of the State of New York and to service of process upon driver or shipper for the commencement of any action in connection herewith by certified mail addressed to his last known address* within the United States. This Bill of Lading agreement supersedes all prior written or oral representations of carrier and constitutes the entire agreement between shipper and carrier and shipper and driver and may not be changed except in writing signed by an officer of carrier. This Bill of Lading agreement shall be deemed executed by the carrier at its principal office in New York City. *Any claim or controversy, whether founded in contract or tort, arising out of or relating to this agreement or the performance or breach thereof, is non-assignable and shall be settled by arbitration in the City, County, and State of New York, provided however, that upon such arbitration the arbitrator(s) shall be bound by, and may not vary or modify, the provisions of this Bill of Lading agreement and shall, at the request of any party thereto, apply the rules and laws of evidence that would otherwise apply in a court of proper jurisdiction.*

Picked up in the Above Condition Except as Noted

Shipper or Shipper's Agent X J. W. Thomas

Driver James T. Boulger

Date 2/15/71

Delivered in the Above Condition Except as Noted

Consignee (Shipper's Agent) X

Driver Received Full Payment

Date

Total Payment Due at Destination $50.00 only, in cash to Driver when car is delivered in Satisfactory Condition.

Driver shall purchase permits in Arizona, New Mexico and Nevada where required by Law.

Driver Destination

Name James T. Boulger

Address Rt. 1

City Chillicothe, Ohio

Phone 993-2625

St. Petersburg
2422 Central Ave.
896-4634

(Italics mine.)

**Letter, Dated December 12, 1973 (Zola and Zola to Honorable Morris E. Lasker).**

ZOLA AND ZOLA

COUNSELLORS AT LAW

228 West 41st Street

New York, New York 10036

December 12, 1973

Honorable Morris E. Lasker
Judge, United States District Court
Federal Courthouse
Foley Square
New York, New York 10007

Re: Aaacon Auto Transport, Inc.
v. Thomas

Honorable Sir:

I have this day spoken with Miss Martin of your office concerning your Endorsement Decision of December 10, 1973. I informed her that the language therein indicating that "the Commission rendered its decision" concerning the invalidity of the bill of lading agreement is incorrect.

All that has been issued is a report of a *hearing examiner* which reviews the facts and makes *proposed* findings which are in no way binding upon the Commission.

The hearing examiner is required by law to draft a form of proposed order, which is contained on pages 13 through 16 thereof. This is *not* a final order of the Commission, which will review the facts and law *de novo* before rendering its decision. It has not yet rendered a decision.

Parenthetically we note that the hearing examiner's decision omitted any reference to *any* of the 156 exhibits and 7 witnesses presented by Aaacon and *solely* summarized the case of the Bureau of Enforcement. The Commission itself may do otherwise.

Accordingly, we respectfully request that your Memorandum Endorsement be recalled and reconsidered and that in accordance with your original Memorandum dated June 14, 1973, that the matter be held in abeyance until the Commission renders its decision and that decision becomes final.

Respectfully submitted,

ZOLA AND ZOLA
/s/ RALPH J. ZOLA

RJZ:be

cc: LaGinestra and Donnelly, Esqs.
10 Platt Street
New York, New York 10038